

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

RUBY ROSE,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security

Defendant.

No. CV 03-00743 AGR

MEMORANDUM OPINION AND ORDER

Plaintiff Ruby Rose ("Rose") filed this action on January 31, 2003. On June 30, 2003, the Court remanded the case pursuant to Sentence 6 of 42 U.S.C. § 405(g) because the file could not be located. On October 3, 2006, the Court, upon stipulation of the parties, ordered that the case is reopened. On March 14, 2007, the case was transferred to Magistrate Judge Alicia G. Rosenberg. Pursuant to 28 U.S.C. § 636(c), the parties filed Consents to proceed before Magistrate Judge Rosenberg on March 22, 2007, and March 27, 2007. Pursuant to the Court's Order, the parties filed an amended Joint Stipulation on March 27, 2007, that addresses the disputed issues in the case. The Commissioner filed the certified administrative record ("AR"). The Court has taken the Joint Stipulation under submission without oral argument.

1 Having reviewed the entire file, the Court concludes that the decision of the
2 Commissioner must be reversed and remanded with instructions for the payment of
3 benefits.

4 I.

5 **PROCEDURAL BACKGROUND**

6 On February 28, 2001, Rose filed the application for Supplemental Security
7 Income benefits that is at issue before this Court. A.R. 330-34. Rose had filed at least
8 three prior applications on March 27, 1989, October 19, 1994, and April 20, 1998. A.R.
9 484. The three prior applications were denied at various administrative levels. *Id.*

10 The Administration denied the February 28, 2001 application at the initial stage
11 and issued a notice on April 30, 2001. A.R. 321-25. Rose sought review before an
12 Administrative Law Judge ("ALJ"). A.R. 326. The ALJ conducted a hearing on
13 February 19, 2002, and a supplemental hearing on May 14, 2002. A.R. 30-52.

14 On May 29, 2002, the ALJ issued a decision denying benefits. A.R. 18-23.

15 Rose sought review with the Appeals Council. A.R. 12. On November 29, 2002,
16 the Appeals Council denied the case and cast the ALJ's decision dated May 29, 2002
17 as the final decision of the Commissioner. A.R. 3-4.

18 Rose filed a complaint with the Central District of California on January 31, 2003.
19 On June 30, 2003, the Court remanded the case pursuant to sentence 6 of 42 U.S.C. §
20 405(g) because the file could not be located. A.R. 536-37. On October 23, 2003, the
21 Appeals Council vacated the May 29, 2002 decision and remanded the claim. In the
22 remand order, the Appeals Council stated that it had reviewed the file on its own and
23 determined that the ALJ failed to evaluate Rose's obesity under former Social Security
24 Ruling 00-3p. A.R. 538-40.

25 On December 7, 2004, the ALJ who issued the May 29, 2002 decision conducted
26 a hearing. A.R. 483, 496-518. The ALJ noted that Rose had filed a new application
27 while her district court appeal was pending, and that Rose had been granted benefits as
28 of January 14, 2003. A.R. 484, 489.

1 On January 6, 2005, the ALJ issued an unfavorable decision. A.R. 483-89. On
2 February 11, 2005, and February 14, 2005, Rose sought review of the ALJ's decision.
3 A.R. 458, 460. On May 20, 2005, the Appeals Council denied review and the ALJ's
4 decision became the final decision of the Commissioner. A.R. 595-96.

5 II.

6 STANDARD OF REVIEW

7 Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the
8 Commissioner's decision to deny benefits. The decision will be disturbed only if it is not
9 supported by substantial evidence or it is based upon the application of improper legal
10 standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995); *Drouin v. Sullivan*,
11 966 F.2d 1255, 1257 (9th Cir. 1992).

12 In this context, "substantial evidence" means "more than a mere scintilla but less
13 than a preponderance – it is such relevant evidence that a reasonable mind might
14 accept as adequate to support the conclusion." *Moncada*, 60 F.3d at 523. When
15 determining whether substantial evidence exists to support the Commissioner's
16 decision, the Court examines the administrative record as a whole, considering adverse
17 as well as supporting evidence. *Drouin*, 966 F.2d at 1257. Where the evidence is
18 susceptible to more than one rational interpretation, the Court must defer to the decision
19 of the Commissioner. *Moncada*, 60 F.3d at 523.

20 III.

21 EVALUATION OF DISABILITY

22 The parties agree that Rose's subsequent application for benefits was granted as
23 of January 14, 2003. Therefore, the only issue before this Court is whether Rose was
24 disabled during the period February 28, 2001 through January 13, 2003. The ALJ was
25 apparently unable to obtain the file for Rose's subsequent application dated January 14,
26 2003. A.R. 484, 541.

27 With respect to Rose's application dated February 28, 2001, the Appeal Council's
28 order dated October 23, 2003, vacated the ALJ's order dated May 29, 2002 and

1 remanded to the ALJ to “evaluate the claimant’s obesity, and determine its effects on
2 her ability to engage in work-related activities.” A.R. 540.

3 Rose contends that the ALJ erred in rejecting the testimony of his own medical
4 expert. For the reasons set forth below, the Court agrees and remands with instructions
5 for an award of benefits.

6 **A. The Rebuttable Presumption of Nondisability and Changed**
7 **Circumstances**

8 Rose does not dispute that there is a continuing rebuttable presumption on
9 nondisability pursuant to *Chavez v. Bowen*, 844 F.2d 691, 693 (9th Cir. 1988). When a
10 claimant’s application for SSI benefits is denied and the claimant does not appeal, the
11 decision denying benefits becomes binding and creates a presumption of continuing
12 nondisability. *Id.* Here, the ALJ applied the presumption based on prior ALJ decisions
13 on May 15, 1990 and September 20, 1996, and some findings in the April 20, 1999
14 decision, all of which were not appealed. A.R. 485-86.

15 In a subsequent application for benefits, the claimant “must prove ‘changed
16 circumstances.’” *Chavez*, 844 F.2d at 693. Changed circumstances may include age, a
17 claim of impairment not considered in the previous application(s), or an increase in the
18 severity of an existing impairment. *Lester v. Chater*, 81 F.3d 821, 827-28 (9th Cir.
19 1995).

20 Here, the impairment not considered in the previous applications – whether alone
21 or in combination with other impairments – was obesity. Upon remand by the district
22 court, the Administration remanded the case to the ALJ because “the Administrative
23 Law Judge did not address the claimant’s obesity.” A.R. 539. The remand order noted
24 that Rose has a diagnosis of obesity, and that her weight increased from 228 pounds in
25 October 2000 to 235 pounds at a height of 5'5" in April 2001.¹ *Id.* (citing A.R. 380-84,
26 417-19). The remand order noted that the prior “April 20, 1999 hearing decision also
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28 ¹ Rose’s weight fluctuated, but reached 244 pounds in September 2001. A.R. 573.

1 did not address the claimant's obesity." *Id.* Pursuant to applicable regulations, the
 2 remand order stated that "[f]urther evaluation and development are necessary to
 3 determine the effects of the claimant's obesity on her ability to engage in work-related
 4 activities." *Id.* The ALJ "will evaluate the claimant's obesity, and determine its effects
 5 on her ability to engage in work-related activities." A.R. 540.

6 **B. The ALJ's Decision**

7 The ALJ found that Rose failed to overcome the presumption of continuing
 8 nondisability. A.R. 488. Rose "has no impairment or combination of impairments that
 9 precludes her from performing her past relevant light work as a school custodian" which
 10 she performed in October 1994 – March 1996.² *Id.* In so holding, the ALJ rejected the
 11 medical opinion of an expert subpoenaed by the ALJ to testify at the hearing on
 12 remand. *Id.*

13 The medical expert, Dr. Loren T. Dewind, testified based on review of the medical
 14 exhibits pursuant to subpoena from the ALJ. A.R. 492-93, A.R. 513. At the hearing, the
 15 ALJ certified that Dr. Dewind was qualified to testify as a medical expert. A.R. 512; A.R.
 16 593-94 (Dr. Dewind's curriculum vitae). In response to the ALJ's questioning, Dr.
 17 Dewind testified that obesity is a medically determinable impairment and that, in Rose's
 18 case, "I don't believe the obesity would affect her ability more than minimally." A.R.
 19 513-14. Dr. Dewind explained that the basis for that conclusion was his review of the
 20 medical records, including X-rays. A.R. 514.

21 In response to questioning by Rose's counsel, Dr. Dewind gave the following
 22 testimony:

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25 ² In the first step, the ALJ found that during the relevant period Rose did not engage
 26 in substantial gainful activity. A.R. 489; 20 C.F.R. §§ 404.1520, 416.920. At step two, the
 27 ALJ found that Rose suffered from the severe impairments of spinal arthritis, arthritis of
 28 both knees, noninsulin-dependent diabetes mellitus, abnormalities of the cervix, a
 neurofibroma of the right foot, and obesity. *Id.* At step three, the ALJ found that Rose did
 not meet or equal a listing.

1 Q: Okay. So as the Judge just said, do you think that this
2 individual would need some type of limitation like a sit/stand
3 option? Do you think that would be reasonable?

4 A: Yes, I do.

5 A.R. 516. In response to follow-up questioning by the ALJ, Dr. Dewind explained his
6 testimony as follows:

7 Q: Now Dr. Dewind, you've indicated that the sit/stand
8 option would be – is it reasonable or desirable in this case?
9 Because you first said that it didn't more than minimally affect
10 her ability to function.

11 A: Well yeah, it doesn't affect her more than minimally, but
12 minimally might require some time sitting during the job, more
13 than she would otherwise.

14 Q: In this particular case, does it clearly indicate that this
15 person should have a sit/stand option, in your opinion?

16 A: I believe so. I believe that she has enough pain and
17 enough impairment in her strength so that it would be best if
18 she would have a sit/stand option.

19 Q: Is that because of her obesity or because of the pain in
20 her feet and legs?

21 A: Both.

22 A.R. 516-17. Dr. Dewind's testimony was uncontradicted by any other physician.

23 The medical expert's testimony regarding the sit/stand option was critical. The
24 vocational expert, who was also subpoenaed by the ALJ and certified by the ALJ as an
25 expert in his field, testified that a person with the limitations that Rose has plus the
26 required sit/stand option would **not** be able to do her past work. A.R. 490-91, 512, 517;
27 A.R. 542 (vocational expert's resume). In addition, the vocational expert testified that

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1 Rose does not have any transferable skills. A.R. 517. The vocational expert's
2 testimony was uncontradicted.

3 Dr. Dewind was a non-examining medical expert subpoenaed by the ALJ.
4 Greater weight may be given to a nonexamining physician who testifies at the hearing
5 and is subject to cross examination. *Andrews v. Shalala*, 53 F.3d 1035, 1042 (9th Cir.
6 1995). Moreover, Dr. Dewind's curriculum vitae indicated several publications in the
7 area of obesity. A.R. 594. Dr. Dewind's opinion could be credited on account of that
8 expertise. 20 C.F.R. § 416.927(d)(5); *Andrews*, 53 F.3d at 1042.

9 The ALJ's rejection of Dr. Dewind's uncontradicted opinion is not supported by
10 substantial evidence or reasonable inferences drawn from the record. The ALJ rejected
11 Dr. Dewind's testimony on the ground that "the evidence fails to establish that the
12 claimant has, in fact, experienced severe pain or weakness due to any cause." A.R.
13 488. The ALJ's statement is not accurate. The ALJ found that Rose suffered from
14 spinal arthritis, arthritis of the right knee, and neurofibroma of the right foot (which had
15 increased somewhat in size).³ A.R. 487. The medical record contains evidence of
16 impairments, in combination with obesity and advancing age, that could reasonably be
17 expected to produce pain. A.R. 404, 406, 440-41, 566, 573, 579. This is sufficient
18 evidence of impairments "that could reasonably be expected to produce the pain."
19 *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir. 1989) (citation omitted).

20 The ALJ cannot require Rose to produce medical evidence establishing the
21 severity of the pain. "It is reversible as a matter of law to discredit excess pain
22 testimony only because the medical evidence does not fully establish that level of pain."

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27 ³ The ALJ stated that the consultant examiner had noted crepitation at both knee joints
28 in April 2001. A.R. 487. In September 2001, a treating physician noted "degenerative
changes involving the knee joint including probable opaque loose body." A.R. 574.

1 *Id.* The ALJ may not require the severity of pain to be corroborated by objective
2 medical evidence.⁴ *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991) (en banc).

3 Because the ALJ's rejection of Dr. Dewind's testimony was not supported, Dr.
4 Dewind's opinion is credited as a matter of law. See *Widmark v. Barnhart*, 454 F.3d
5 1063, 1069 (9th Cir. 2006).

6 **C. The Remedy**

7 Rose argues that remand for an award of benefits is the proper remedy in this
8 case because the vocational expert's testimony established that Rose could not perform
9 her past work and has no transferable skills. Therefore, Rose contends that she would
10 grid out under grid rule 202.04. Rose is correct. Where application of the grids directs
11 a finding of disability, that finding must be accepted whether the impairment is
12 exertional or results from a combination of exertional and non-exertional limitations.
13 *Cooper v. Sullivan*, 880 F.2d 1152, 1157 (9th Cir. 1989) (finding of disability based on
14 Secretary's own witness and application of grids).

15 Because Rose's entitlement to benefits is clear and no useful purpose would be
16 served by further administrative proceedings, the ALJ's decision is reversed and
17 remanded for an award of benefits. *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir.
18 2006).

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24 ⁴ Defendant urges the Court to construe the ALJ's rejection of Dr. Dewind's testimony
25 as a finding that Rose's complaints of pain were not credible. The Court declines to do so.
26 The ALJ did not make any express findings that Rose was not credible. An ALJ who
27 disbelieves a claimant's pain testimony must provide clear and convincing reasons by
28 specifically identifying what testimony is not credible and what evidence undermines the
claimant's complaints. *Lester*, 81 F.3d at 834. An implicit finding that the claimant is not
credible is insufficient. *Albalos v. Sullivan*, 907 F.2d 871, 874 (9th Cir. 1990).

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3 **IV.**

4 **REMAND**

5 IT IS HEREBY ORDERED that the decision of the Commissioner is reversed and
6 this action is remanded to defendant for an award of benefits.

7 IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order
8 and the Judgment herein on all parties or their counsel.

9 DATED: June 8, 2007

10 /s/
11 ALICIA G. ROSENBERG
12 UNITED STATES MAGISTRATE JUDGE
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